A **HONG LEONG FINANCE BHD**

v.

LAYSA VIEW SDN BHD

B HIGH COURT MALAYA, JOHOR BAHRU
MOHD ZAWAWI SALLEH JC
[ORIGINATING SUMMONS NO: MT(3) 24-276-2004]
25 AUGUST 2009

C ***LAND LAW:*** *Charge - Order for sale - Reserve price - Maintaining same reserve price for subsequent auction - Third auction successful but bidder failed to pay - Whether reserve price of third auction can be maintained for fourth auction*

D ***LAND LAW:*** *Sale of land - Auction - Summons applying for auction date - Service on chargor - Summons served by registered post deemed served after seven days from date of posting*

LAND LAW: *Sale of land - Order for sale - Auction date - Whether subsequent auctions can be held less than one month from date of hearing* E *of application for auction date - Whether s. 257(1)(b) National Land Code regulates dates for subsequent auctions*

On 6 July 2005, the High Court granted an order for sale of the charged property. The defendant did not cause an appearance to be F entered on its behalf despite having been served with the cause papers. The first two auctions were unsuccessful as there was no bidders. The third auction was then scheduled at a reduced reserve price of RM683,000 based on a valuation report by Henry Butcher Malaysia. The third auction was successful but since the successful G bidder failed to pay the balance price within the permitted timeline, the plaintiff forfeited the deposit and applied for a fresh auction at the same reserve price of the property. On 27 June 2008, the High Court allowed the fourth auction, scheduled for 14 July 2008. This auction was successful. The defendant filed the present application H seeking a stay of the completion of the sale to the successful bidder and in the alternative sought damages from the plaintiff for loss of the charged property. The defendant claimed that: (i) the plaintiff's summons in chambers applying for the fourth auction date was not served on the defendant at least 14 days before the hearing; (ii) the I reserve price did not reflect the market value of the property; (iii) the plaintiff had arranged for a bidder to attend the auction and bid for the property thereby denying other bidders the opportunity to

attend and bid at the auction; and (iv) the auction was held 17 days after the hearing of the summons applying for a fresh auction instead of at least one month after.

Held (dismissing the application with costs):

(1) The summons was served by registered post on 18 June 2008. Based on section 12.01 of the charge, the summons would be deemed served after seven days from the date of posting. This means the summons posted on 18 June 2008 was served on 24 June 2008. The hearing was scheduled for 27 June 2008. Thus, the defendant was served with the summons two clear days before that date. There was no merit in the defendant's contention that the plaintiff failed to serve the summons within the requisite time. (paras 11 & 12)

(2) Since the successful bidder at the third auction failed to pay, naturally the fourth auction would be at the last reserve price *ie*, RM683,000. This price was fixed based on a valuation report from Henry Butcher Malaysia. (para 15)

(3) There was no evidence that the plaintiff had "arranged" for a single bidder to attend the auction. The court appointed licensed auctioneer for the fourth auction had filed an affidavit to confirm that the scheduled auction had been advertised in the newspapers and that 300 copies of the proclamation of sale had been widely distributed. (para 18)

(4) It is only the first auction that must not be held on a date less than one month from the date of the order for sale. Nothing in s. 257(1)(b) of the National Land Code regulates when subsequent auctions are held. The plaintiff and the registrar acted within the boundary of the law when the date for the fourth auction was fixed on 14 July 2008. (para 21)

Case(s) referred to:

Am Finance Berhad v. Atlantic Ruby Sdn & 2 Ors [2005] 1 LNS 257 HC ***(refd)***

Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee) [1994] 2 CLJ 1 SC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Aluran Intelek Sdn Bhd; Law Hock Hua & Anor (Interveners) [2001] 7 CLJ 381 HC ***(refd)***

Lim Hun Giap & Satu Lagi v. Mok Chee Wai & Yang Lain [2001] 7 CLJ 208 HC ***(refd)***

Maimunah Megat Montak v. Maybank Finance Bhd [1996] 3 CLJ 9 FC ***(refd)***

A *Malayan Banking Bhd v. PK Rajamani & Anor [2004] 3 CLJ 79 CA* ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***
NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd [1992] 3 CLJ 1680; [1992] 1 CLJ (Rep) 244 ***(refd)***
B *Perwira Affin Bank Bhd v. Tan Ah Tong [2003] 2 CLJ 320 HC* ***(refd)***

Legislation referred to:
National Land Code, s. 257(1)(i), (b)
Rules of the High Court 1980, O. 32 r. 3

C *For the plaintiff - Clarence Edwin; M/s Clarence Edwin Law Offices*
For the defendant - Nurazam Razali; M/s L Parthiban, Zulkiflee & Assoc

Reported by Suresh Nathan

D

JUDGMENT

Mohd Zawawi Salleh JC:

The Application

E **[1]** This summons in chambers (encl. 17R) concerns an application by the defendant seeking for the following orders:

(1) Satu penggantungan penyempurnaan jualan tanah bagi hartanah yang dikenali sebagai HS(D) No. 194098 PTD No. 58445 Mukim Pulai, Daerah Johor Bahru, Negeri Johor ("hartanah
F tersebut") kepada pembeli lelong awam yang telah diadakan pada 14.7.2008 diberikan sehingga pendengaran dan penyelesaian muktamad permohonan ini;

(2) Jika segala dokumentasi dan suratcara bagi penyempurnaan
G Jualan hartanah tersebut telah sempurna, maka satu Perintah untuk Plaintif membayar satu jumlah gantirugi yang dirasakan sesuai dan manfaat kepada Defendan atas kerugian yang dialami yang mana hartanah tersebut sepatutnya dijual dengan harga yang tinggi dan kos gantirugi yang sepatutnya adalah
H sekurang-kurangnya pada kadar RM600,000.00;

(3) Perintah mahkamah bertarikh 27.6.2008 diketepikan;

(4) Jualan lelong yang diadakan pada 14.7.2008 hartanah tersebut kepada pembeli lelong awam yang telah diadakan pada
I 14.7.2008 dibatalkan;

(5) Kos permohonan serta bersampingan dengan permohonan ini ditaksirkan dan dibayar oleh Plaintif kepada Defendan; dan

(6) Relif selanjutnya yang difikirkan adil dan suaimanfaat oleh mahkamah yang mulia ini.

[2] The following affidavits have been filed in relation to encl. 17R:

(a) The affidavit of Tay Poh Heng affirmed on 22 December 2008 ("D1");

(b) The affidavit-in-reply of Sowaran Kor affirmed on 19 February 2009 ("P1");

(c) The affidavit-in-reply of Tay Poh Heng affirmed on 4 May 2009 ("D2"); and

(d) The affidavit-in-reply of Sowaran Kor affirmed on 2 June 2009 ("P2").

[3] The application rests on the following grounds:

(a) The defendant had no knowledge of the order of court fixing the auction on 14 July 2008 because the defendant had not been served with the plaintiff's application for an auction date to be fixed;

(b) The reserve price for the purposes of the auction does not reflect the market value of the property;

(c) The plaintiff had arranged for a bidder to attend the auction and bid for the property thereby denying other bidders the opportunity to attend and bid at the auction; and

(d) The auction was held 17 days after the hearing of the summons applying for a fresh auction instead of at least one month after.

Brief Facts

[4] To ensure a proscriptive appreciation of this case, some antecedent events leading to the application are set in detail:

4.1 On 6 July 2005, the High Court granted an order for sale of the charged property. The defendant did not cause an appearance to be entered on its behalf despite having been

served with the originating summons and the notice of appointment fixing the hearing of the summons (see affidavit of service of Ng Lay Jin affirmed on 25 August 2006).

4.2 Thereafter, the plaintif filed a summons for directions and on 16 September 2005, the High Court gave directions for the public auction of the property. The auction was fixed on 8 December 2005 and the reserve price RM960,000. The auction was unsuccessful because there were no bidders.

4.3 By a summons dated 20 February 2006, the plaintiff applied for a second auction of the property at a reduced reserve price. The defendant was served with the application but failed to attend the hearing. On 19 September 2006, the High Court granted the application. The second auction was then fixed for 16 January 2007 and the reserve price was reduced to RM864,000. This was a 10% reduction from the last reserve price. The second auction was also unsuccessful as there were no bidders.

4.4 The plaintiff then filed a summons dated 28 March 2007 to schedule yet another auction at a further reduced price. Again, the summons was served on the defendant but the defendant failed to attend the hearing. The application was heard and granted on 25 September 2007. The third auction was scheduled for 13 December 2007. The reserve price was reduced to RM683,000 based on a valuation report by Henry Butcher Malaysia.

4.5 The third auction was successful. The property was sold for RM1,105,000. However, the successful bidder failed to pay the balance price within the permitted timeline. Following this, the plaintiff forfeited the sum of RM110,500 and utilized the said sum in the manner provided by s. 267A of the National Land Code 1965.

4.6 The plaintiff then proceeded to apply for a fresh auction of the property. A summons dated 8 May 2008 was filed for this purpose. This summons was yet served on the defendant. On 27 June 2008, the High Court granted the application. A fourth auction was scheduled for 14 July 2008 and the reserve price was maintained at RM683,000.

4.7 The auction proceeded on 14 July 2008 and the property was sold to one Mr. Lee Ah Bah at RM683,000.

[5] It is pertinent to note at the outset that the defendant had been absent from these proceedings from the time proceedings commenced. Despite having been served with the cause papers, the defendant chose not to attend the hearing of the originating summons before the judge and the subsequent summonses dealt with by the Registrar.

[6] I shall now deliver my grounds on the four grounds raised by the defendant.

First Ground: Alleged Non-service Of The Application For The Fourth – Action

[7] The defendant in its supporting affidavit alleged that it had not been served with the application for the fourth auction. However, in the plaintiff's affidavit in reply (P1), a copy of the plaintiff's letter to the defendant enclosing a copy of the summons in chambers and supporting affidavit and notifying the defendant that the hearing was scheduled for 27 June 2008 was exhibited. The proof of posting was likewise produced (see exh. "SK1" in P1).

[8] When confronted with the aforesaid documents, the defendant altered its stance. The defendant now contends that the summons in chambers was not served 14 days before the date of the hearing. In support of his argument, learned counsel for the defendant relied upon the following decisions:

(i) *Lim Hun Giap & Satu lagi v Mok Chee Wai & Yang Lain* [2001] 7 CLJ 208;

(ii) *Malayan Banking Bhd v. PK Rajamani & Anor* [2004] 3 CLJ 79;

(iii) *OCBC (Malaysia) Bhd v. Aluran Intelek Sdn Bhd; Law Hock Hua & Anor (Interveners)* [2001] 7 CLJ 381; and

(iv) *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14.

[9] In other words, the defendant now concedes that the documents were served on it but that a procedural requirement was not complied with. The procedural requirement in question is the time within which the summons needs to be served on a defendant. The defendant contends that a summon in chambers needs to be served at least 14 days before the hearing.

[10] To my mind, the relevant law on this point would be O. 32 r. 3 of the Rules of the High Court 1980, which enacts as follows:

> A summons asking only for the extention or abridgment of any period of time may be served on the day before the day specified in the summons for the hearing thereof but, except as aforesaid and unless the court otherwise orders or any of these rules otherwise provide, **a summons must be served on every other party not less than 2 clear days before the day so specified.** (emphasis added).

[11] Now in this instant case, the summons was served by registered post on 18 June 2008. When was it delivered? The answer to that question is found in section 12.01 of the charge, which provides:

> In the event legal proceedings are instituted by the Lender against the Chargor(s) the originating process shall be deemed to have been duly served on the Chargor(s):
>
> (a) If the originating process is sent by hand, at the time a copy of the originating process is left at the address of the Chargor(s) hereinstated or at such other address as the Chargor(s) may notify the Lender by way of AR Registered Post from time to time which address shall be within the territories of Malaysia;
>
> (b) If the originating process is sent by prepaid registered post, on the 7th day (including the day of posting) from the date the originating process is put into post addressed to the Chargor(s) at the address of the Chargo(s) hereinstated or such other address as the Chargor(s) may notify the Lender by way of AR Registered Post from time to time which address shall be within the territories of Malaysia.
>
> Provided Always that the Lender shall only be deemed to have notification of the Chargor(s)' charge of address if the Lender has actually received the notice of such change sent by the Chargor(s).
>
> The provisions of this Section 12.01(a) and (b) shall apply to the service of any other legal processes whatsoever by or on behalf of the Lender on the Chargor(s).

[12] Based on the terms of the charge, the summons in chambers would be deemed served after seven days from the date of posting. This means the summons posted on 18 June 2008 was served on 24 June 2008. The hearing was scheduled for 27 June 2008. It is

evident that the defendant was served with the summons two clear days before that date. There is thus no merit in the defendant's contention that the plaintiff had failed to serve the summons within the requisite time frame.

[13] It needs to be mentioned that the courts have in the past given effect to contractual provisions by which parties agreed to the mode of service of legal process. In this regard, reference may be made to the judgment of Abdul Wahab Said J in *Am Finance Berhad v. Atlantic Ruby Sdn & 2 Ors* [2005] 1 LNS 257 and the decision of the Supreme Court in *Amanah Merchant Bank Bhd v. Lim Tow Choon; (Through Official Assignee)* [1994] 2 CLJ 1.

Second Ground: Reserve Price Alledgedly Not The Market Price

[14] The property was put up for sale at RM683,000 during the third auction. Learned counsel for the defendant submitted that the reserve price was below the market price. In support of its case, the defendant has produced a valuation report by Jurunilai Bersekutu in which the market value is estimated at RM1,365,000. Reference was also made to the case of *NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd* [1992] 3 CLJ 1680; [1992] 1 CLJ (Rep) 244.

[15] It ought to be remembered that in this instant case, the property was sold at the auction but the successful bidder failed to pay the balance purchase price. This prompted the plaintif to forfeit the deposit and apply to the court to put up the property for auction again. Naturally the auction would be at the last reserve price. This price was fixed based on a valuation report from Henry Butcher Malaysia.

[16] In my considered opinion, the Valuation Report by Jurunilai Bersekutu suffered the following defects:

(a) First, the date of the valuation is 27 April 2009. There is nothing in the valuation report to suggest that this was the market value of the property at the date of the sale; and

(b) Second, the defendant has obviously withheld material information from the valuer, which could have affected the valuation of the property. The material information withheld is the fact that the property had been put up for auction prior to this at RM960,000, RM864,000 and RM683,000 and the attempts to sell the property all failed.

[17] It is also important to note from a practical standpoint that properties sold *via* auction hardly ever get sold at the market price. Lest it be forgotten, even in this instant case, the property was first put up for sale initially at RM960,000 but there were no bidders. People who frequent auctions are bargain hunters. This is an undeniable truth. Most of them adopt a wait and see approach – basically waiting patiently for the reserve price to plummet after a series of failed auctions. If it were otherwise, we would not need auctions to dispose of charged properties. The chargors could very well find buyers to purchase their properties at the "market value". But the fact of the matter is that it is never a simple matter to offload a property and this is the reason why even prime properties go through so many rounds of failed auctions and consecutive reductions of reserve price before bidders come on the scene.

Third Ground: The Plaintiff Had Arranged For A Single Bidder

[18] The defendant had not produced a single shred of evidence that the plaintiff had "arranged" for a single bidder to attend the auction. It is necessary to note that the court appointed a licensed auctioneer to handle the fourth auction. The auctioneer in question prepared the proclamation of sale. The auctioneer has filed an affidavit in this court to confirm that the scheduled auction had been advertised in the newspapers and that 300 copies of the proclamation of sale had been widely distributed. Obviously, news of the auction had been widely circulated. The plaintiff cannot be held responsible if only one bidder turned up even after steps were taken to widely publicize the auction.

Fourth Ground: The Auction Should Have Taken Place One Month After The Summons Was Heard

[19] Learned counsel for defendant submitted that the auction should have taken place one month after the summons was heard. Reference was made to s. 257(1)(i) of the National Land Code 1965 and the decisions of the following cases:

(i) *Maimunah Megat Montak v. Maybank Finance Bhd* [1996] 3 CLJ 9; and

(ii) *Perwira Affin Bank Bhd v. Tan Ah Tong* [2003] 2 CLJ 320.

[20] With respect, this contention is not founded on any legal provision. The National Land Code 1965 is clear on this point. Section 257(1)(b) of the Code provides:

> Every **order for sale** made by the Court under section 256 shall be in Form 16H and shall:
>
> (b) **require the sale to be held on,** or as soon as may be after, a date specified therein, being **a date not less than one month after the date on which the order is made** … (emphasis added)

[21] Section 257(1)(b) of the Code leaves no room for doubt. It is only the first auction that must not be held on a date less than one month from the date of the order for sale. Nothing in the section regulates when subsequent auctions are held. There is thus no legal basis for the defendant's contention. The plaintiff and the learned Registrar acted within the boundary of the law when the date for the fourth auction was fixed on 14 July 2008.

Conclusion

[22] For the foregoing reasons, the defendant has failed to establish any legal basis for its application. The evidence shows that the plaintiff has followed all legal and procedural requirements. The evidence also shows that the learned Registrar had acted on the valuation report available to him, which the defendant did not then and has not now refuted.

[23] The defendant's claim that the property was sold at undervalue and its consequential claim for damages against the plaintiff are likewise claims without legal foundation. Even the defendant's allegation that it has received an offer for RM1.2 million for the property is an empty statement. Neither has the alleged offer been exhibited nor has the identity of this mysterious buyer been disclosed. All in, it can safely be concluded that this application is nothing more than the defendant's attempt to escape the payment of the shortfall owing to the plaintiff.

[24] In the circumstances, the application in encl. 17R is dismissed with costs.